UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Virginia K. DeMarchi, Magistrate Judge

TAYLOR, et al.,

Plaintiffs,

vs.

GOOGLE, LLC,

Defendant.

No. C 20-07956-VKD

San Jose, California
Tuesday, June 25, 2024

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THE CLERK: Calling Case 20-CV-7956-VKD, Taylor, et al. versus Google, LLC, on for further Case Management Conference.

If the parties could state their appearances, please, beginning with Plaintiffs' counsel.

MR. WALLENSTEIN (via Zoom): Good afternoon, your Honor. Marc Wallenstein for the putative class from Korein Tillery.

THE COURT: Good afternoon.

MR. SOMVICHIAN (via Zoom): Good afternoon, your Honor. Whitty Somvichian with Cooley, representing Google.

THE COURT: Good afternoon.

I have reviewed the Joint Case Management Statement. Thank you for submitting that. The statement reveals that a number of disagreements remain between the parties about how this case should proceed. So, that's what we're going to attend to today.

Let me start with the question of Google's proposal for a further motion -- Rule 12 motion regarding the consent issue. And let me just walk through some -- some points here and see if I can understand exactly where we are.

So, first, I want to confirm that both parties agree

that the consent issue remains an issue in the case and that the disagreement is about whether Google ought to be permitted to address the matter in a Rule 12 motion or whether it may be addressed only in a motion for summary judgment or a trial or some other effort after a more complete factual record has been developed.

Is that -- am I correct that that's the dispute?

MR. WALLENSTEIN: Yes, your Honor.

MR. SOMVICHIAN: Yes.

THE COURT: Okay. Very good. So, let me just share some observations based on what you provided in your joint statement and some looking into the authorities you referred to that we did.

So, my view is that Google is correct that the consent issue was raised in its earlier motion to dismiss and that I did not reach that issue in deciding the motion on other grounds. And, so, I'm not persuaded that Google was required to raise this issue on appeal as the Appellee. So, there is no waiver of that defense, and I think nobody's really contending it has been waived based on your remark just a moment ago.

So, then I proceed to the question of whether Rule 12(b) applies here. The consent issue was not omitted from Google's prior motion. So, that's one of the predicates of Rule 12(g). So, I don't think that applies either. And I'm

specifically referring to the provision at 12(g)(2), limitation on further motions.

So, I went back and looked at the earlier briefing, and it seems to me unlikely that addressing the issue of consent at the pleadings stage is really a good use of the Court and the parties' time. I just don't think that permitting yet another Rule 12 motion, presumably a Rule 12(c) motion, after there has been an answer will be a productive exercise.

And, again, just looking back at what was before me before, my inclination is to proceed with discovery and address the consent defense on a more complete factual record at some later time. I'm -- I just -- we need to get going is my view.

And, so, that brings me to the last observation before I -- I hear from you both on this issue, which is that it appears Google doesn't dispute that the answer was due to be filed within 14 days of remand I think, if my calculation is correct. There has been no answer yet. I assume that Google wants to file one and that there would be no objection to filing an answer, but I -- I would like to hear about that issue as well, and -- and we ought to get that done so that we can move on.

So -- so, that was my thinking on this proposal about consent, and I'd like to hear from both parties in reaction

to those remarks, and let me just -- well, let me just start with Google first since it was your proposal.

MR. SOMVICHIAN: Yes, your Honor. So, we believe the issue -- the issue hasn't been waived. As -- as a pleadings level issue, it hasn't been addressed. I -- I -- I hear you, what you're advising us as to whether it would be a productive use of time, and we'll consult with our client accordingly.

I do think -- just -- just to be clear, I think there -- there was a little bit of disconnect in terms of how we are thinking of the -- the consent issue and how the plaintiffs were construing it in -- in their -- in their portion of the CMC statement and describing -- trying to explain why they didn't think it was appropriate for being resolved as a pleadings argument.

There -- there may be other layers of the consent argument, but what we are proposing to address is the express consent argument based on users' agreement to -- to the terms. There may be other factual issues related to other variations of a consent argument around implied consent based on knowledge and -- and conduct and so forth.

We -- we aren't contemplating addressing that or raising that as a -- as a Rule 12 motion, and it would be limited to the express consent issues. All -- everything that you need to consider is in the record. The terms are

attached to the complaint. If -- if, your Honor, you're trying to telegraph what -- what your views may be, again, we will consider that. But in terms of a motion that's appropriate for being addressed at a pleadings stage, I think it is something that has not been addressed, can be addressed, is appropriate to be addressed at the pleadings, deferring other variations of -- of the consent issue for -- for later, which we agree with.

In terms of the -- the answer, the timing that I think we're referring to, we construe the rule as -- as not dictating the timing for a remand from -- from the Court of Appeal and when the remand reaches the District Court but, rather, the timing once a motion to dismiss is -- is denied in the District Court. And if there's a -- a disconnect between our interpretation, we, of course, will -- will hustle and get an answer prepared. That would -- that doesn't resolve the issue of whether there should be a motion, but the motion then would be a Rule 12(c) motion for judgment on the pleadings.

So, if -- if your Honor is -- is concerned with further delay in the case based on, you know, our proposal to have another round of motion practice while deferring discovery, those things can proceed in parallel, and things can get moving, as you said, and we can attend to other matters, get the -- get the discovery process started, resolve issues,

figure out a schedule, and start working towards the next steps in the case. That's not mutually exclusive to presenting an argument that we think could potentially resolve the case and having that addressed at least at a juncture before we get into the class cert case. So, all those things could proceed in parallel, your Honor, if that's your primary concern is that we ought to get things started without further delay or a stay in the case

THE COURT: So, thank you. Let me just ask a follow-up question before I let Mr. Wallenstein comment. Is the motion that you have in mind on the express consent issue different than the one you presented in your prior motions?

MR. SOMVICHIAN: Not materially. So, your Honor, I can't say that -- there may be some -- you know, that was briefed years ago I think at this point. So, there certainly would be additional authorities to present to you. The -- the thrust of the argument is -- is similar. So, it's not dramatically different.

THE COURT: All right. Thank you for that.

Let me hear from Mr. Wallenstein, please.

MR. WALLENSTEIN: Yes, your Honor. I appreciate your inclination, and I just want to briefly highlight reasons why I think it's correct. Ultimately, the decision whether to allow another round of motions practice is up to

your discretion, and the reason you should exercise your discretion to not allow it is most basically, we haven't amended our complaint. Typically, you only get one bite at the apple. There has already been an appeal to the Ninth Circuit. Google could have easily raised this argument before the Ninth Circuit if it wanted to. It raised two other arguments that your Honor didn't decide as alternative bases to appeal. Had it done that, the Ninth Circuit would have had an opportunity to decide it.

If your Honor were to allow Google to pursue that motion now, if you were to rule in Google's favor, that could lead to another Ninth Circuit appeal before we've even gotten to the discovery phase. And the reason why that's particularly prejudicial -- that's prejudicial in any case, kind of two rounds to the Ninth Circuit at the motion to dismiss stage is unusual, but that would be extremely prejudicial in this case because a class has been certified in California. So, the rights of the putative class in this case, although it's a totally different class, they've crystalized, I would suggest, and there is some urgency to get things moving, as your Honor said.

THE COURT: Well, I really hope that it has crystalized. We'll get to that next, but -- but, yes. Okay. So, all those matters were addressed in the statement on your behalf. So, I appreciate that point.

I didn't mean to cut you off. If there's anything --

MR. WALLENSTEIN: No. Minor point of order. Whether you decide this issue just as a matter of your discretion or -- or not is neither here nor there. But, to clarify, we actually do believe that Google waived the argument because they didn't raise it on appeal. It's not because they didn't raise it in the brief before, and you may -- I understand -- yeah.

THE COURT: See, here's -- I don't want to have briefing on that.

MR. WALLENSTEIN: Right.

THE COURT: I don't think that's a -- this is not a good use of anyone's time. And while I am reluctant to tell a party you cannot file this motion even if you have theoretically a right to file a motion or to make an argument, I'm trying to signal pretty strongly that I do view it as not an effective use of our time. But first things first. Google has to answer.

Can Google get the answer done -- I don't know how long you need, but you need an answer. So, how long will it take you to get an answer on file?

MR. SOMVICHIAN: Can we have 30 days, your Honor?

THE COURT: How about July 9th? That's two weeks. Does that work?

MR. SOMVICHIAN: I've got folks on my side who are

out. I -- I know you want to get things moving. Can we get the -- the week after that?

THE COURT: Okay. So, that would be the 13th. right. Yes. All right. July 13th.

MR. SOMVICHIAN: I've got that as a Saturday.

THE COURT: Oh, I'm sorry. Maybe I'm counting wrong. The 16th, excuse me.

MR. SOMVICHIAN: Okay.

THE COURT: July 16th. All right. And I don't view this as introducing any prejudice for anyone because there will be no stay of discovery. We're going to get going. No matter what, Mr Somvichian, you acknowledge that that's an option at least, even if not Google's preference.

So, we will go ahead and proceed with all the things we need to do in the case, regardless of what else happens on the motion practice side.

So, let me just ask, have the parties exchanged initial disclosures or is that still to be done?

MR. SOMVICHIAN: That was done a long time ago.

THE COURT: Long time ago.

MR. SOMVICHIAN: There was a round of initial disclosures.

THE COURT: Okay. So, that already --

MR. SOMVICHIAN: I think Mr. Wallenstein may have -- may have forgotten that.

THE COURT: Right. All right. Well, obviously, if you need to update something in light of intervening events and things you've learned, you, of course, would be permitted to do that and are required to do that as the Rules require.

Okay. So, that's -- the initial disclosures have been done. I did have some questions about to tell me of the discovery obtained in the Chupo (phonetic) action. So, let me just again see if I can crystalize where we are.

Do the parties agree that the discovery that has already been obtained by either side in the Chupo action may be used in this case?

MR. WALLENSTEIN: Yes, Plaintiffs do, your Honor.

THE COURT: And -- and, Mr. Somvichian, I know you have reservations that maybe this is a contingent question because you have some reservations about the discovery rulings and that kind of thing, but if it's already been obtained, produced by Google, for example, in the Chupo litigation, do you agree that it can be used in this case, without having to reask for it?

MR. SOMVICHIAN: It is -- yes with a caveat, your Honor.

THE COURT: Okay.

MR. SOMVICHIAN: So, the -- the record in the case that's -- the record in Chupo is the result of -- we're

about four and a half years into the case, with lots of heavily contested discovery and motion practice, compromises along the way, things that we gave the Plaintiffs that we felt we -- that were outside the scope of discovery but we made judgment calls to -- to provide.

I'm sure on the other side Mr. Wallenstein will say there are things not in the record that they feel they're absolutely entitled to and we stiffed them, but they made a judgment call not to fight for it.

The point is the record is -- is a -- is a reflection of a long course of litigation and compromises on both sides and -- and rulings that we've done that have gone both ways. And, from our perspective, if -- if the entirety of that comes into the record here and the Plaintiffs are also, on top of that, allowed to pursue things that they were precluded from -- from getting in the Chupo case, pursuing new discovery that they decided to forego in the Chupo case, now it's a -- there's a one-way benefit to -- to the efficiencies here. They get everything that was -- was fought over in the -- in the Chupo case and the ability to -- to ask for more.

So, I'll -- I'll give you a specific example.

THE COURT: No, I don't need a specific example. Let me just pause you there because I think there might be some sort of misconception about what I have in mind I

should share with you, and then we can address this -- this concern that Google has.

So, I -- I chuckled because you refer to information coming into the record. If something is not relevant as an evidentiary matter, it is not in the record, right. So, there may be a pile of discovery in the State Court matter that is not relevant to this case. Maybe they obtained it from you. You had to produce it because you were ordered to do that, and it just is not relevant.

I'm -- I'm not really getting into that issue. We're talking about discovery only and whether that material can be considered discovery and not have to be resought in this case. That's the efficiency I'm -- I'm focusing on at sort of a very basic level. And, so, maybe there's still a dispute about that because of the unfairness and discovery burden and the fact that it's asymmetrical discovery here. I mean, Google is by far more greatly burdened than the Plaintiffs are by virtue of the fact that you have all the information or most of the information. So, I appreciate that point. But the -- the disagreement between the parties I think maybe should be thought of in -- in the following context.

So, I can't resolve your dispute about whether something's fair or not fair or, you know, whether a particular ruling in the State Court action should be

adopted in this -- in this case or what have you, in a vacuum. Just can't do that. And I won't do that.

But the way discovery is going to work in this case is the way it works in every federal case, which is the Federal Rules of Civil Procedure and, in particular, Rule 26 will apply. Your discovery has to be relevant and proportional to the needs of the case. I'm not inclined to impose some additional threshold beyond what Rule 26 requires. However, I do expect the parties to be efficient, and if relevant discovery has already been obtained in the Chupo action, then I would expect the parties not to duplicate that effort here. So, that's the efficiency is to not duplicate stuff. Maybe there's other stuff that isn't relevant here, and that's neither here nor there. It's just I don't want you to duplicate discovery. I don't want you to serve the same interrogatories and document requests when you've already obtained that information in the State Court matter and you can simply agree to use it here. That's what I am -- what I'm focusing on.

I don't see any reason to conclude that the discovery rulings in the State Court are binding on discovery disputes before me. Google suggests I ought to find these decisions binding. Without more information or context, I simply can't do that. However, I would expect that the reasoning of the State Court might be persuasive in a given case, and

I would invite the parties, if they think it bears on a matter before me, a discovery dispute, to share that with me so I can consider it. And, in fact, if that reasoning is really persuasive, I would expect the parties to exercise some restraint and not ask me to redecide the same thing where you already had a considered decision and, you know, a well reasoned outcome and you're just like trying to take another whack of it, that's not a good use of somebody's time either.

So, if you -- if you take a look at a decision the State Court has made on a particular discovery point that comes up again here, and, you know, I would -- I would encourage you to just reflect before you file that matter before me. But it should be obvious that I am not legally bound by a discovery decision made in the State Court, and there is no presumption that arises from the fact that the State Court has decided something. That's just not the law, and I'm not going to conduct discovery that way.

So, on the point that Google raises, I really -- I really want to emphasize the distinction between discovery that already has happened. You've already, for lack of a better word, been prejudiced by having to produce it in the State Court case, something you didn't want to produce. It already exists in the world, and you may disagree about whether it has relevance or any kind of evidentiary

significance in this case, but those matters can be addressed when they arise in terms of summary judgment or trial or any of those things where the -- the things that exist in the discovery milieu that you all have accumulated over the last four and a half years actually bear on any issue in this case.

So, that's the way I've been thinking about it. And, you know, again, I'm not -- I'm not really able to resolve any particular dispute in -- in a kind of vacuum or at a high level abstract way, but that's how I see it -- it sort of shaking out. And I just -- in case it's not abundantly clear to the parties, you know, there are -- there are things that have happened in the State Court case. I may or may not find them persuasive. It should be clear to you all that I am not going to just follow whatever the State Court does. It should be clear that I make my own decision. Right or wrong, I will make my independent decision about that, and that should be clear from the history of the case so far.

So, I will say another word to Mr. Wallenstein in particular. It is not appropriate to use the discovery process in this case to take discovery of matters that are relevant solely to the State Court case. So, that would be an inappropriate use of the federal discovery process. However, if an issue arises about whether the Plaintiffs may

use discovery properly obtained in this case in the State Court case, that is a matter for the State Court to decide. Okay. So, I would only expect, and I will insist and require that the discovery that you all take of each other in this federal case is for this federal case and not in aid of the State Court case. Maybe there's overlap. And if there's a problem with use of that in the State Court case, that is for the State Court judge to decide.

So, that's -- that's how I'm thinking about it. I will -- I will now invite you all to be heard, having heard those -- those remarks. And, Mr. Somvichian, maybe you wish to continue your thought process on some of these issues, especially about the prejudice point, but I did want to just share my perspective.

MR. SOMVICHIAN: Yes. Thank you, your Honor. That's very helpful as a guide for us. I do have some questions on how you envision your framework working with respect to certain disputes that I -- that I, unfortunately, anticipate in terms of what discovery materials from Chupo could be used for what purpose. So --

THE COURT: Okay.

MR. SOMVICHIAN: -- in connection with the Chupo matter, we have produced certain data relating to the named Plaintiffs in the Chupo case.

THE COURT: Um-hmm.

MR. SOMVICHIAN: Now, there's some awkwardness between just there in terms of using data about certain named Plaintiffs in a different matter in -- in a different case that doesn't -- in which they're not parties. There's no certified class here. But, setting that aside, significant portions of that data we don't view as being within the proper scope of discovery. We produced it as a compromise and to address a court order in the Chupo matter.

What I hear you saying is that's in the record, don't duplicate that work, and if there are disputes about whether it can be used, maybe that can be addressed in some separate process here, but if -- if our -- if in our view that should not be part of the record, that shouldn't be something that the experts in this case consider, for example, on class certification or as a -- as a grounds to, you know, seek additional follow-up discovery in this matter, is there a vehicle that, you know, short of some Daubert motion down the road against the expert, that seems too far down the -- the road to -- to address something like that.

THE COURT: Yeah. I mean, I have been thinking about this, and it's a good question, solely in the context of discovery practice and not whether an expert would rely on X, Y or Z, and, so, the rule about using discovery in one case in another case is the subject of multiple Ninth Circuit opinions. And, generally, discovery is available.

It's not part of the record until it's part of the record. Do you see what I mean? So, it's not part of the evidentiary record for any decision in the case until it is.

So, if there's been -- I would not expect that all of the information that is obtained in the State Court case actually has any bearing on anything in this case. In other words, if it's about the named Plaintiffs in that case, it has nothing to do with the named Plaintiffs in this case. I don't know how you all anticipate using it, but the question you raise is about using information obtained in discovery, not whether it can be had in the first place.

So, you know, so, I think that it -- I'm not entirely sure when that will first come up, but if there's a need to address that, I -- I think we can crystalize that. But I'm speaking really about discovery, and I have an expedited discovery dispute procedure that is in place, and both parties should be familiar with it. It's in my standing order. I know Mr. Somvichian is very familiar with it, and that's how we'll deal with discovery disputes. If there's something from the State Court, like a decision from the State Court that one or the other parties thinks I should consider and it's not available to me and you want to attach it, I'm happy to let you attach it if that will be helpful as a clarification for -- otherwise, you can't attach things except the -- the material itself, the interrogatory, the

document request or whatever, without leave of court. So, if -- if you need that permission in advance in order to share these decisions with me, that's fine. Usually I just look up whatever I need to look up based on the citations. But if I can't access it and it seems like there are some informal rulings I may not be able to access, then, fine, you can attach it.

But I think, Mr. Somvichian, your question is more to use, not discovery in the first place. And I'm -- you know, I'm happy to have the parties talk about how they think those kinds of issues might best be addressed in what time frame and what format by the Court if it will be important for you to know, say, in advance of expert reports or -- I don't know what -- summary judgment motions or something like that. Otherwise, I'll deal with it when I have the -- the Daubert motion or the summary judgment motion, but I -- you know, whatever would be least disruptive to your preparation, I'm happy to entertain that issue.

But I would like for you to confer about it first, okay. And I don't want someone to say, The Judge said, no, you can't contest this ever because I -- I'm really -- my remarks are really directed to the normal ordinary process of obtaining discovery, most of which never makes it into the record, right, never, when we talk about an evidentiary record, right.

So -- so, that's -- that's how I -- I don't know if I answered your question, but I -- it's probably a function of not -- not really being able to do it in a vacuum. So -- so, feel free to raise the particular concern, you know, in -- in some different -- some different fashion. You can make it as a motion. We can talk about it that way. That's fine. But I do want you to talk to each other first. Okay?

MR. SOMVICHIAN: Understood, your Honor.

THE COURT: Is there anything else that you wanted to -- to raise on that point before I turn to Mr. Wallenstein on the discovery issue and how we handle discovery?

MR. SOMVICHIAN: No.

THE COURT: Okay. So, Mr. Wallenstein, any thoughts about discovery? Any questions about my remarks about it?

MR. WALLENSTEIN: No, your Honor. Your remarks were very clear. I appreciate them. I agree with them, and I will take to heart your direction to not seek discovery in this case for use -- solely for use in Chupo.

THE COURT: Yeah.

MR. WALLENSTEIN: And it may be that discovery produced in this case is or is not allowed to be used in Chupo. Then that's up to the State Court judge, but I -- I -- I will ensure that all the discovery requests lodged in

this case are for this case.

THE COURT: Okay. All right. Well, we'll see how it goes.

Let me turn to a question I had for you all about the status of the Chupo matter, and I just didn't understand what was going on. Probably it's because I'm not as familiar with State Court practice, but also this wasn't entirely elaborated on in your statement.

The parties refer to an initial class certification proceeding and also to a second class certification proceeding. Is the State Court conducting multiple serial class certification proceedings? I don't know who wants to take that.

MR. WALLENSTEIN: Well, I feel like Whitty talked a lot. So, maybe I should explain this one, though I'm happy to have him do it if you like.

THE COURT: I just want to try to understand what's going on.

MR. SOMVICHIAN: I'll let Mr. Wallenstein take a crack at it.

THE COURT: Okay. There you go.

MR. WALLENSTEIN: So, early in the Chupo case, actually, before my tenure on the case, the parties decided to narrow the scope of the case to really laser focus on class certification, and they limited the case to three

exemplar types of network transfers. Those were the subject of a class certification motion -- discovery and a class certification motion. A class was certified.

The parties then had a dispute about what happens next. The Plaintiffs argued that now we're allowed to pursue other types of network transfers. That was the whole idea is to relieve Google's discovery burden. And then, if we won, we would get merits discovery, damages discovery.

THE COURT: Beyond the three examples?

MR. WALLENSTEIN: Beyond the three exemplars. Google opposed that. I would welcome Shitty to -- Mr. Somvichian to explain his position. Ultimately, the Court ruled in Plaintiffs' favor mostly. We didn't think we needed another round of class certification briefing. We did not win that point. So, we're now engaged in a second phase of discovery about additional types of network transfers, and there will be another round of class certification about those types of network transfers.

THE COURT: I see. And is it classes, like, is it just the nature and boundary of the class or are you all addressing like subclasses?

MR. WALLENSTEIN: So, there was one class certified initially. It may be that that same class will be -- still have to be certified in the new round of motions practice. It may be that we would propose subclasses.

We're still working those issues out.

THE COURT: I see. Okay. All right.

Mr. Somvichian, anything you'd like to add or dispute about that description?

MR. SOMVICHIAN: No. That -- I think that's an accurate description. I mean, I think the -- the need for the second round of class cert relates to a dispute that we had on the scope of the first order.

THE COURT: Okay.

MR. SOMVICHIAN: They -- the Plaintiffs construed it as there's a certified class which just defines a group of people, and now we can litigate on a class-wide basis any and all data transfers that might have impacted those people. Our view was we litigated three specific things going into the class cert phase. That's the only -- those are the only transfers that can be litigated on a class-wide basis. The Court said, well, you -- it was kind of a win or loss for -- for both of us. The Court said you, Plaintiffs, can try to add to the class, but I'll let you do that in a second round of class certification. So, that -- that's what we're litigating.

THE COURT: I see. Got it. Okay. Well, that was helpful. Thank you for explaining that, and I'll just leave it there.

With respect to a case schedule, I do need you all to

propose a case schedule. So, typically, in a class -- class action matter, I would have a schedule that includes up to, you know, briefing and hearing on a motion for class certification and then sort of leave the rest of it for later. However, you know, it may be that given that you have a perhaps well developed understanding of how long things might take in this case based on your experience in the State Court case, it might be appropriate for the parties to have a proposed schedule that goes beyond class certification and includes a merits phase, if we get there, and a trial date, if we get there.

So, you know, I -- I invite you to confer about that, and I believe it was the Plaintiff that was pressing for something that gets set through trial. I will just tell you for your information that in 2025, the months of September, October, and November are mostly open. And, of course, there is availability in 2026 as well. I have one matter in late October. I think the 22nd through the 28th is already set for trial, but, otherwise, no trials. And those are not criminal duty months for me as a Magistrate Judge. And I have forgotten when my criminal duty months are in -- in 2026, but if you need that information, you can check with my courtroom deputy.

So, what I would encourage you to do is, you know, be as comprehensive as possible. If you want to have a

schedule that is formulated through class certification and then have sort of contingent deadlines after that, that's fine too, but you can kind of get a sense of what my calendar looks like and what might be possible. That's why I share that information with you.

So, I would ask you to submit a proposed schedule. And I would say -- I would ask at least that your proposed schedule included deadlines for submission of a proposed protective order. I don't think we have one in this case, and perhaps you need an ESI protocol as well or you could just file those things. You don't need to have a schedule that says when you're going to do them. You can -- if you're ready to go on those -- those matters, you can, but I don't want those kinds of things to hold up progress. So, you should consider adding that to your schedule.

And then, finally, Rule 16 requires me to set a deadline to amend pleadings. I don't think there's any indication from the parties that there is an anticipated amendment of the pleadings, but I will put a deadline in there. And if you want to confer about that and suggest one, you can do that as well. But that's what I'd like to see in your proposed schedule.

How long do you all think you need in order to get something to me after conferring with each other? Can we do two weeks from today, July 9th?

MR. WALLENSTEIN: We can. We have three depositions in the Chupo case in that time. Doesn't mean we can't do both, but both sides are focused on those things. It may make sense to add one more week.

THE COURT: Okay. So, that would be the 16th. So, that would be the same date that the answer is due. Does that work for Google?

MR. SOMVICHIAN: Yes, your Honor.

THE COURT: Okay. So, I'll give you until the 16th of July to get me a proposed case schedule.

The other matter I wanted to raise with you is ADR. I don't think you've done any ADR, at least not in my case. And I don't know if there is any reason to have some notion or coordination with the State Court case, which is much much farther along. But, ordinarily, we need to do some ADR, and I need a proposal for ADR.

Have you all talked about that? Have you engaged in something that might -- that has already happened that might bear on this case? Where are we on ADR? Let me just ask that open-ended question.

Mr. Wallenstein, I'll ask you first.

MR. WALLENSTEIN: The Plaintiffs would welcome any discussion Google wishes to have. We have not to date engaged in ADR.

THE COURT: Okay. And, Mr. Somvichian, any

thoughts?

MR. SOMVICHIAN: We're -- we're happy to have that discussion, your Honor, but Mr. Wallenstein's right. The parties have not -- certainly haven't scheduled a mediation or had much meaningful discussion about a process.

THE COURT: Okay. Well, why don't you consider that, and when you submit your case schedule, why don't you just include your thoughts about ADR, when it might make sense, what form. You know, I'm -- I'm not going to require that you do it immediately if it doesn't make sense or anything like that. I'm going to be guided by what you think is going to be a good use of your time. Okay. So -- so, let me know in your -- in your further submission.

All right. So, that was pretty much the agenda that I had based on your statement. Is there anything else that you all would like to talk about while we're here -- while we're all here? Mr. Wallenstein?

MR. WALLENSTEIN: No, your Honor.

THE COURT: Mr. Somvichian, anything else?

MR. SOMVICHIAN: I -- I -- just to clarify some of your comments, your Honor, and the guidance that you were giving us.

In terms of the overarching directive, which I took away, was don't -- don't duplicate work here. Don't duplicate discovery.

With respect to potentially duplicating redundant discovery disputes that have been already fully litigated and resolved in the State Court case, is -- is it your view that, you know, if Plaintiffs were precluded from getting something in the State Court case, still fair game in -- in this case? You're certainly not bound by that, and we were never suggesting that you were, but as a matter of efficiency and just overall case management, having certainty on that would be helpful. And if -- and if it's -- well, it is fair game and -- and if something needs to be litigated a second time, then, you know -- then so be it. We understand that guidance, but I think that -- that would be helpful to have certainty on in terms of whether there remains an ability for both sides to -- to relitigate issues that were already fully resolved.

THE COURT: Well, technically, yes, because this is a totally different case. And maybe the State Court got it wrong for this federal case. So, the State Court is deciding matters under State Court discovery procedures and rules and whatever was presented to the State Court. So, theoretically, yes, you could have, I guess, what is mostly the same dispute that could legitimately be brought before me, but I -- I'm going to tell you that if you lost in the State Court and the reasoning of the State Court was persuasive and you really think about it and you think, You

know what? This is a loser issue for me, don't waste my time with it. Don't waste your time with it. You know, you have to exercise some judgment. I know it's really hard. You're tempted to like relitigate everything, but you will quickly find out that's not a good use of your time if the State Court's analysis and judgment and conclusion is persuasive. And that's why I'm inviting you to share it with me.

So, I don't think -- and this is maybe something I should have elaborated on with Mr. Wallenstein. I think it was the Plaintiffs' point. I -- I hope it's not the case that as to these informal discovery rulings that there's a prohibition on sharing that with me. I don't know if the informal decisions include a rationale, but if there's a rationale that's articulated, I -- I wasn't sure that I understood exactly what the Plaintiffs were saying about that, but somehow they're not available to be used or shared or cited. I would hope that you could so that I can have the benefit of that.

MR. WALLENSTEIN: So, your Honor, I will -- I'll answer that question at least to the best of my ability. But I just want to reiterate something we wrote in our brief, which is for the -- there are three formal motions to compel. Two have been decided. Plaintiffs do not currently plan to relitigate those issues. We very much take to heart

the notion that it is, although perhaps legally possible, often ill advised to --

THE COURT: Yes.

MR. WALLENSTEIN: -- relitigate issues that have already been decided. I can't promise that we won't seek to relitigate anything. Maybe there's something that's really important that we genuinely believe the State Court judge got wrong. Right now, that isn't the case with respect to the -- the written decisions that he's issued on the formal motions to compel.

So, with respect to the informal discovery conferences, all but one don't have written decisions. So, they have briefs and an off-the-record, no court reporter discussion. I think the parties could discuss whether we can communicate the judge's inclinations to you or not. We would probably need to get his permission. I'm sure -- I'm not sure he -- perhaps he would allow it. We could work something out so that you would know, but there is -- only one of those has a written decision, and it is a tentative ruling. It's not a final enforceable decision.

THE COURT: Yeah. I mean, I don't want us to get into a place where we're trying to reconstruct and having an argument about what the judge thought or meant or said to you. Like, that -- we're not going to do that.

MR. WALLENSTEIN: Yes, your Honor.

THE COURT: So, I do not want to go down that road at all. I don't want to see the briefing. What I don't want is briefing in front of the State Court and then here's the result and, therefore, the State Court must have adopted my argument in this -- in this brief. No, no. We're not doing that. So, if that's -- if that's what you're seeking clarification on, I'll just put the kabosh on it right now. Don't do that. That's just not helpful.

MR. WALLENSTEIN: Yes, your Honor.

THE COURT: If there's some --

MR. WALLENSTEIN: Yes.

THE COURT: -- clear statement, whether it's a transcript or an order or something of the State Court's rationale for a particular outcome in -- in a particular dispute that is also before me, yes, please share that. Otherwise, don't. And I'll just -- I'll just deal with it in the context in which it's appropriately dealt with in Federal Court, which is Rule 26.

MR. WALLENSTEIN: Very well, your Honor.

THE COURT: And that's how we'll proceed. Okay.

Okay. So, if we're all done with the agenda items, I do have one little thing to say to you all, which is that I was disappointed to see references to lack of cooperation in the Case Management Statement. And I don't want to hear about whose fault it was. I just don't want it to happen

again. Okay.

MR. WALLENSTEIN: Very well, your Honor.

THE COURT: So, in the unlikely event that you have discovery disputes, you know, the -- the main message from my -- that I hope to convey in my standing order about discovery disputes is that you must confer in advance and try to reach agreement on a resolution. And, if not, you shall crystalize your positions so that when I get a joint discovery letter, it's not as if someone's making an argument for the first time, the other party hasn't had an opportunity to address it and can't respond to it. The whole point of the joint submission is that I see both parties' positions crystalized in one place.

It's also -- my order is intended to deter foot dragging. So, think about what I need to resolve your dispute, and make sure it's in the motion. I don't want to read about who said what to whom. I don't want to know about your discovery correspondence. I don't want to know about the back and forth. I just want the issue crystalized.

And, so, when -- when you're doing your joint letter, just omit the adjectives and adjectives -- adjectives and adverbs about each other and the conduct and whatever and just like get to the point, the law and the facts that I need. Okay. And that's -- that's really what I try to

accomplish with that expedited dispute resolution procedure, which, you know, it's not -- it's not perfect, but it's the best thing I've come up with. So -- so, I just -- I just wanted to give that little -- little lecture while I had you both here, and hopefully we won't -- we won't have to revisit that issue. Okay.

All right. So, I will go ahead and issue a Case Management Order, and we'll look for your further submission so we can get a case schedule in place, and we'll go from there. Thank you very much.

ALL: Thank you, your Honor.

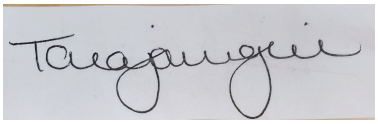
THE CLERK: Court is concluded.

(Proceedings adjourned at 2:12 p.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.



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